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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 318.

JULIAN LANE, FRANK WINCHELL, MILLARD GILMORE, R. E. DEAS, and J. M. CARUTHERS, As and Constituting the FLORIDA STATE RACING COMMISSION, *Petitioners*,

vs.

VOLUSIA COUNTY KENNEL CLUB, INC., a Corporation, et al., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

PETITION FOR CERTIORARI.

JULIAN LANE, FRANK WINCHELL, MILLARD G. GILMORE, R. E. DILG and J. M. CARUTHERS, as and constituting the FLORIDA STATE RACING COMMISSION, an agency of the State of Florida, and RICHARD

W. ERVIN, as Attorney General of the State of Florida, pray that a Writ of Certiorari issue to review the final decision and judgment of the Supreme Court of the State of Florida, the same being the court of last resort of the said State, entered on June 1, 1954, in the case of the VOLUSIA COUNTY KENNEL CLUB, a corporation, *et al.*, appellants, v. the FLORIDA STATE RACING COMMISSION, being Case No. 24,980, and the rehearing therein entertained, considered and denied by said court on July 6, 1954 (not yet reported in either a State reporter or the Southern Reporter).

SUMMARY STATEMENT OF MATTER INVOLVED.

The Supreme Court of Florida recently declared unconstitutional a state statute levying an additional tax upon pari-mutuel wagering pools of Florida dog racing tracks graduated according to the size of individual pools. Every dog track having the same size pool pays the same tax. It based its decision upon *Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, and *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22, and in so doing stated:

> *"It therefore appears that the doctrine established by the Supreme Court of the United States in the Stewart and Valentine cases has been strictly followed in Florida and is the controlling law in Florida on the subject now under consideration."*

The holding in the *Stewart* and *Valentine cases, supra,* is that certain types of graduated taxes on gross receipts of dry goods stores, etc., are unconstitutional, as being a denial of equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. In the opinion of the Florida Supreme Court in the instant

case reference was made both to the Fourteenth Amendment of the United States Constitution and to a somewhat similar provision in the Florida Constitution (Section 1, Declaration of Rights) relating to denial of equal protection, but it is manifest that the controlling law in the case is drawn directly from Federal decisions of the United States Supreme Court and that the Florida Court's decision is predicated solely upon the United States Supreme Court's construction of the Fourteenth Amendment and the Florida Court applied what it considered to be that construction to the graduated tax in the instant case.

It is the burden of this petition, as will hereinafter be clearly shown, that the Florida Supreme Court has misapplied the construction of the Federal Constitution in said federal cases in determining the constitutionality of the Florida dog track tax.

Copies of opinions of the Florida Supreme Court are attached to the petition as an appendix.

During the first dog racing season after the questioned statute became effective, approximately $2,285,000 was paid to the State, which amount was to be distributed sixty percent in equal portions to the counties of the State and forty percent to the State Welfare Department for an assistance program to the totally and permanently disabled (R. 7).

The Chief Justice of the Florida Supreme Court on July 9, 1954, granted a stay to the petitioners and issued an order holding the proceedings *in status quo* until a petition for review could be presented to this Court.

JURISDICTION OF THIS COURT TO REVIEW.

The jurisdiction of this Court is invoked under Title 28, Section 1257, of the United States Code, in that the validity of a state statute (Section 550.16, Florida Statutes, as amended by Section 1, Chapter 28058, Laws of Florida, Acts of 1953) is drawn in question on the ground of its being repugnant to the Fourteenth Amendment to the United States Constitution. Judgment of the Supreme Court of Florida was entered July 6, 1954. This petition is filed within ninety days of said judgment.

The question of the validity of said Section 550.16, Florida Statutes, as amended by Chapter 28058, Laws of Florida, Acts of 1953, was raised by the Bill of Complaint (paragraph numbered "XII," R. 13) and the Answer (paragraph numbered "XII") and Motion to Dismiss (7th ground, R. 27-28). The Circuit Court held that the said Section 550.16, Florida Statutes, as amended, did not offend either the State or the Federal Constitution; however, the Supreme Court of Florida disagreed with this holding and reversed the order of the Circuit Court holding that the additional tax imposed by Chapter 28058, Laws of Florida, Acts of 1953, "is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida." It is alleged in the first prayer of the Bill of Complaint that the graduated tax imposed by said Chapter 28058 "is arbitrary, unreasonable and discriminatory as to the plaintiffs and is not based upon any reasonable classification, but is unconstitutional and void because it violates Section 1 of the Declaration of Rights of the Constitution of Florida and denies to the plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States" (R.

13). *Section 1 of the Declaration of Rights of the Florida Constitution* provides that *"all men are equal before the law,* and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety" (Emphasis supplied).

The Supreme Court of Florida, in its opinion of June 1, 1954, stated in part that:

> "The appellants contend that the case of *Stewart Dry Goods Company* v. *Lewis,* (1935) 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, and other similar cases are controlling in this case. The Stewart case appears to be the leading case on the subject.
>
> * * * * * * *
>
> "The Stewart case was followed by the case of *Valentine* v. *Great Atlantic & Pacific Tea Co.,* (1936) 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22. That case involved tax on certain types of retail stores based upon an accumulated graduated scale * * *
>
> * * * * * * *
>
> "This court applied the holding of the United States Supreme Court in the Stewart and Valentine cases in the cases of *State ex rel. Lane Drug Stores* v. *Simpson,* 122 Fla. 582, 166 So. 227; *State ex rel. Adams* v. *Lee,* 122 Fla. 639, 166 So. 249; *Chavers* v. *Harrell,* 122 Fla. 669, 166 So. 261 * * *
>
> * * * * * * *
>
> *"It, therefore, appears that the doctrine established by the Supreme Court of the United States in the Stewart and Valentine cases has been strictly followed in Florida and is the controlling law in Florida on the subject now under consideration* (Emphasis supplied).
>
> "In the case of *State ex rel. Cole* v. *Keller,* 129 Fla. 276, 176 So. 176, in an opinion by Mr. Justice Terrell, a tax levied by the City of Tampa upon the gradu-

> ated income of attorneys at law was held to be invalid. See also *City of DeLand* v. *Florida Public Service Company,* 119 Fla. 804, 161 So. 735."

After stating the above authorities the court concludes that:

> "The effect of the attempted imposition of the tax is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida."

The Court's opinion of July 6, 1954, upon the Petition for Re-hearing, cites no further authority upon the question of violation of the State and Federal Constitution and concludes that:

> "* * * What we held, and now repeat, was that any attempted tax upon a new classification based solely on the amount of gross receipts of a business heretofore recognized by the Legislature as being a legitimate business constituted a denial of the equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the State of Florida * * *."

Only as above indicated did the Supreme Court of Florida mention the Declaration of Rights of the State of Florida in the body of its opinions.

An examination of the opinions of the Florida Supreme Court in *State ex rel. Lane Drug Stores* v. *Simpson,* 122 Fla. 582, 166 So. 227 and *State ex rel. Adams* v. *Lee,* 122 Fla. 639, 166 So. 249, reveal that they were predicated upon the holdings of the Supreme Court of the United States in the Stewart and Valentine cases. *Chavers* v. *Harrell,* 122 Fla. 669, 166 So. 261, was decided *per curiam* upon the said Lane Drug Stores and Adams cases. *State ex rel. Cole* v. *Keller,* 129 Fla. 276, 176 So. 176, was pred-

icated upon the Stewart and Valentine cases and the last above cited Florida cases. The Stewart case appears to have been among the primary authority cited by the Supreme Court of Florida for its conclusion in *City of DeLand* v. *Florida Public Service Company*, 119 Fla. 804, 161 So. 735. *State ex rel. McKay* v. *Keller*, 140 Fla. 346, 191 So. 542, involved an income tax question under Section 11, Article IX, of the State Constitution, and *City of Tampa* v. *Tampa Times Company*, 153 Fla. 709, 15 So. 2d 612, involved a question of freedom of the press.

It is clear from the opinions of the Florida Court (original and on rehearing) that its decision, both as to the Fourteenth Amendment to the United States Constitution and the first section of the Declaration of Rights of the Florida Constitution, was based upon the holding of the Supreme Court of the United States in the *Stewart Dry Goods Company* v. *Lewis*, and *Valentine* v. *Great Atlantic & Pacific Tea Co.* cases, and not by any separate and independent construction of the State constitution. If it had not been for the said Stewart Dry Goods Company and Valentine cases it cannot be said that the Supreme Court of Florida would have reached the conclusion it reached in both the original opinion and opinion on the application for rehearing.

The record shows (R. 30) that in so far as the statute is alleged to have violated any constitutional provision having to do with equal protection the respondents were depending entirely upon the Fourteenth Amendment of the United States Constitution. It therefore is apparent that the Florida Court intended to and did rest its decision upon a determination of the application of the Fourteenth Amendment, and not upon the non-federal ground of the application of the constitution of the State. If the idea should be entertained that the Florida Court rested its

decision in this case upon a determination of the application of the State Constitution, we respectfully submit that under the pleadings and facts of the case and the language of the Court such a non-federal ground is insufficient and inadequate in itself to sustain the Court's judgment independent of the federal question.

A cursory examination of the foregoing cases unmistakably shows that the Florida Court measured the validity of the statute against the Fourteenth Amendment of the United States Constitution, and having concluded that it violated said Fourteenth Amendment held, by way of analogy, that it also violated the equal protection "to men" clause of the Florida Constitution.

QUESTIONS PRESENTED TO COURT FOR REVIEW.

The federal questions decided by the Supreme Court of Florida and brought before this Court for review are as follows:

1. Where by statute dog race track licensees are, under Chapter 550, Florida Statutes, permitted to retain a commission of seventeen per cent of the amounts contributed to pari-mutuel dog race track pools, and this without regard to the size or amount of the pool, may the state legislature legally impose a tax against the daily pools graduated according to the size of individual pools without violating the Fourteenth Amendment to the United States Constitution?

The Supreme Court of Florida, following what it deemed to be the rule in the Stewart Dry Goods Company and Valentine cases, held that such a tax was always and inevitably a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

2. Where by statute dog race track licensees are, under Chapter 550, Florida Statutes, permitted to retain a commission of seventeen per cent of the amounts contributed to pari-mutuel dog race track pools, and this without regard to the size or amount of the pool, is a constant tax of five per cent and an additional tax in accordance with the following schedule, as per Section 550.16, Florida Statutes, as amended, to-wit:

TOTAL PARI-MUTUEL POOL-DOG TRACK	PARI-MUTUEL POOL TAX
Do not exceed $50,000.00	Five per cent
Exceed $50,000.00 but do not exceed $75,000.00	$2,500.00 plus 8% of excess over $50,000.00
Exceed $75,000.00 but do not exceed $100,000.00	$4,500.00 plus 9% of excess over $75,000.00.
Exceed $100,000.00 but do not exceed $125,000.00	$6,750.00 plus 10% of excess over $100,000.00
Exceed $125,000.00 but do not exceed $150,000.00	$9,250.00 plus 11% of excess over $125,000.00
Exceed $150,000.00	$12,000.00 plus 12% of excess over $150,000.00

violative of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

The Supreme Court of Florida answered the above question in the affirmative.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This litigation involves the validity of Subsection (8) of Section 550.16, Florida Statutes, as amended by Section 1, Chapter 28058, Laws of Florida, Acts of 1953. It provides, *inter alia*:

"In addition to the three per cent pari-mutuel tax provided for by Section 550.09 and any and all other taxes otherwise levied and assessed every per-

son, association or corporation conducting a horse race meet shall pay a tax equal to five per cent, and every person, association or corporation, conducting a dog race meet shall pay a tax equal to two per cent, of the total contributions to all pari-mutuel pools there conducted and made on any and every horse race and dog race for operating such horse and dog tracks, which additional tax of five per cent on horse race pari-mutuel pools and two per cent on dog race pari-mutuel pools shall be known as the 'old age assistance tax' and shall be paid to the state treasurer for deposit in the 'old age assistance tax fund'; and, every person, association or corporation conducting a dog race shall also pay additional tax on the total contributions to all pari-mutuel pools there conducted and made each day on dog racing (which includes the three per cent pari-mutuel tax provided by Section 550.09 and the two per cent 'old age assistance tax' provided by this section) in accordance with the schedule hereinafter following:

TOTAL PARI-MUTUEL POOL-DOG TRACK	PARI-MUTUEL POOL TAX
Do not exceed $50,000.00	Five per cent
Exceed $50,000.00 but do not exceed $75,000.00	$2,500.00 plus 8% of excess over $50,000.00
Exceed $75,000.00 but do not exceed $100,000.00	$4,500.00 plus 9% of excess over $75,000.00.
Exceed $100,000.00 but do not exceed $125,000.00	$6,750.00 plus 10% of excess over $100,000.00
Exceed $125,000.00 but do not exceed $150,000.00	$9,250.00 plus 11% of excess over $125,000.00
Exceed $150,000.00	$12,000.00 plus 12% of excess over $150,000.00

which said additional tax as hereinabove provided by aforesaid schedule shall be paid, distributed and deposited as follows: Sixty per cent thereof shall be paid to the state treasurer as *ex officio* treasurer of the state racing commission and shall be distributed equally among the sixty-seven counties of the state in the same manner that the aforesaid three per cent tax is distributed to such counties, and forty per

cent thereof shall be paid to the state treasurer for deposit in the 'old age assistance tax fund.' "

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONCISE STATEMENT OF THE CASE AND MATERIAL FACTS.

"This case involves the legality of an additional tax upon the operator's permissible 'take' from legalized gambling at dog racing tracks based upon a new and additional classification" imposed by Chapter 28058, Laws of Florida, Acts of 1953. The track operator's permissible take, under Subsection (2), Section 550.16, Florida Statutes, is seventeen per cent of the amount contributed to the pari-mutuel pool at the race track. The schedule of the said additional tax appears from Subsection (8) of Section 550.16, Florida Statutes, set out next above. Prior taxes against the said pari-mutuel pools, to which the said schedule of taxes is additional, amount to five per cent of the total pari-mutuel pool. The question of the validity of the statute imposing said additional tax under the said Fourteenth Amendment was raised in the Bill of Complaint filed in the Circuit Court for Leon County, Florida, and especially paragraph numbered "XII" thereof, which is in words and figures as follows:

> "The application of the provisions of Chapter 28058, Laws of 1953, to the plaintiffs will violate the provisions of Section 1 of the Declaration of Rights of the Constitution of Florida and deny them the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States" (R. 13).

And the first prayer which, in so far as is here material, prayed that the court declare and adjudge that the graduated tax imposed by said Chapter 28058,

> "* * * is arbitrary, unreasonable and discriminatory as to the plaintiffs and is not based upon any reasonable classification, but is unconstitutional and void because it violates Section 1 of the Declaration of Rights of the Constitution of Florida and denies to the plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States" (R. 13).

The defendants denied each and every allegation of said paragraph numbered "XII" specifically saying that Chapter 28058, Laws of Florida, Acts of 1953,

> "* * * is a perfectly valid and constitutional enactment of the legislature of the State of Florida and it does not deny plaintiffs, or either of them, equal protection of the law, and said Act is not in violation of Section 1 of the Declaration of Rights of the Constitution of the State of Florida or the Fourteenth Amendment of the Constitution of the United States" (R. 27, 28).

And moving to dismiss the Bill of Complaint on the ground that its allegations are,

> "* * * insufficient to show that Chapter 28058, Laws of Florida, Acts of 1953, or any part or parcel thereof, is in contravention of the Fourteenth Amendment to the United States Constitution or Section 1

of the Declaration of Rights of the Florida Constitution"(R. 28).

The Supreme Court of Florida held that the additional taxes imposed by the above quoted schedule were in the nature of graduated gross receipts taxes and violative of "the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States," as construed by this Court in the above cited *Stewart Dry Goods* v. *Lewis,* and *Valentine* v. *Great Atlantic & Pacifc Tea Co.* cases. The Circuit Court, whose judgment was reversed by the Supreme Court of Florida, held that the said Stewart Dry Goods Company and Valentine cases were not controlling and that the said additional tax so imposed by Chapter 28058, Laws of Florida, Acts of 1953, was a valid tax. The Circuit Court as well as three members of the Supreme Court held that this case was to be distinguished from the Stewart Dry Goods Company and Valentine cases; the Supreme Court of Florida held that this case was ruled by the said cases, saying that the graduated tax imposed "is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States." The federal question was squarely presented to and decided by the Supreme Court of Florida.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) *This Case is of Sufficient Moment to Elicit Certiorari.*—The State of Florida and every other state that authorizes pari-mutuel betting has become pecuniarily interested in racing because of the revenue from the betting. Several states other than Florida have laws on the subject of racing quite similar to the one here in question and

certainly these states are entitled to know how they may tax, regulate and control racing within their borders without running afoul of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

(2) The *basis* for the Supreme Court of Florida's reversal of the order and judgment of the Circuit Court in this case is clearly the holding of the United States Supreme Court in the *Stewart Dry Goods Company* v. *Lewis*, and the *Valentine* and *Great Atlantic & Pacific Tea Co. cases*, and state and federal lower court cases following the said Stewart and Valentine cases, including *State ex rel. Adams* v. *Lee*, 122 Fla. 639, 166 So. 249; *State ex rel. Lane Drug Stores* v. *Simpson*, 122 Fla. 582, 166 So. 227, and *Chavers* v. *Harrell*, 122 Fla. 669, 166 So. 261, which were referred to by the Florida Court in its opinions in this case. After making the statement that the holding in the Stewart and Valentine cases had been applied in numerous Florida cases, naming them, the Florida Court then said, *"It therefore appears that the doctrine established by the Supreme Court of the United States in the Stewart and Valentine cases has been strictly followed in Florida and is the controlling law on the subject now under consideration"* (Emphasis supplied).

This statement clearly places this case within the rule enunciated in *Moorehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, 56 S. Ct. 918, 80 L. Ed. 1347; that is to say that the federal question was presented to and *necessarily* passed on by the Florida Court.

(3) *This case is distinguished from the Stewart and Valentine cases* because of its facts and circumstances, many of which were not involved in either or both of said cases. If we refer to Section 550.16, Florida Statutes, both before and after amendment by Chapter 28058, Laws of

Florida, Acts of 1953, we find that dog racing track licensees under Chapter 550, Florida Statutes, are permitted to collect a commission from their daily pari-mutuel pools equal to *seventeen per cent* of the amounts contributed or bet through the pari-mutuel pool machines at such race tracks (subsection (2), Section 550.16, Florida Statutes) from which seventeen per cent is paid a flat three per cent tax (calculated upon the total amount contributed or bet) under Section 550.09, Florida Statutes, a flat two per cent tax under subsection (8), Section 550.16, Florida Statutes, and the graduated additional tax (set out in schedule above) here brought in question. The taxes paid under the above mentioned three per cent tax, two per cent tax and the graduated additional tax can never exceed the seventeen per cent commission taken by the licensee race track from the pari-mutuel pool. The said three per cent, two per cent and the graduated tax are collected from *only one type of business*—that is dog racing tracks. The said graduated tax is not collected from horse racing tracks in Florida. It is a tax upon a specific type of business—that is, dog racing tracks.

The tax involved in the Stewart case was a graduated tax imposed upon every store or business establishment selling goods, wares or merchandise at retail in the State of Kentucky, including department stores, grocery stores, furniture stores, jewelry stores, hardware stores, dry goods stores, shoe stores, and stores of every kind and nature selling goods, wares and merchandise. The tax involved in the Valentine case was a graduated tax imposed upon sales of goods, wares and merchandise by chain stores without regard to the kind and nature of the goods, wares and merchandise sold. The graduated taxes imposed in the Stewart and Valentine cases were, by the terms of the statutes imposing them, applicable to all sales without regard

to the usual profit or ratio of turnover of sales to invested capital of the goods, wares and merchandise sold. In this case there is involved only one kind of business and the take of the race track from the pari-mutuel pools is fixed at seventeen per cent of the amount bet.

Argument amplifying reasons relied on for allowance of writ.—The above mentioned commission of not to exceed seventeen per cent of the amounts contributed to such pool "which said maximum commission shall include the three per cent tax heretofore provided by Section 550.09, Florida Statutes," together with "the additional tax of two per cent of the total contributions to all pari-mutuel pools conducted on every dog race" in addition to these taxes is levied an additional graduated tax which, together with the said three and two per cent tax, compose the schedule of taxes above set out. The impact of the total tax is the same for all dog race tracks having the same total pari-mutuel pool for any day, although the impact of the tax on a total daily pool of $50,000.00 is not the same as the impact of the tax on a total daily pool of $100,000.00, or on a total daily pool of $150,000.00.

In the instant case the graduated tax under Section 550.16, Florida Statutes, as amended, is levied only on dog racing track pari-mutuel pools (the track is permitted to collect a commission of seventeen per cent of the total pool) it should be remembered that the:

> *Stewart Dry Goods Company* v. *Lewis case, supra,* involved a graduated gross sales or receipts tax imposed upon stores selling goods, wares or merchandise at retail within the State of Kentucky, with certain exceptions not here material, without regard to the nature of the business making the sales, the nature of the goods sold, the turnover of the stock of

goods or the profit realized on such sales. The same rate of tax applied to grocery stores, where the turnover is rapid and the profit small, to furniture and other types of stores where the turnover is slow and the profit large. The tax imposed upon gross sales of one hundred thousand dollars was the same without regard to whether the profit on the sale was small, medium or large. The appellants in this case consisted of a large number of department stores, grocery stores, a grocery and bakery store, and stores selling various lines of merchandise. "The tax is not confined to a particular method of merchandising. All retailers, individual and corporate, selling every description of commodities, in whatever form their enterprises are conducted make up the taxable class" (294 U. S. 555-556, 79 L. Ed. 1057).

Valentine v. *Great Atlantic & Pacific Tea Company Case, supra,* involved an Iowa statute imposing a graduated gross receipts tax upon chain stores of every kind and nature selling goods, wares and merchandise in the State of Iowa. A chain of grocery stores, a chain of department stores and a chain of drug stores were appellants in this case. In the Stewart case the tax was applicable to the sales of all stores, whether chain stores or not, while in this case the tax was applicable only to chains of two or more stores. As in the Stewart case, the taxes involved in this case were not confined to a particular method of merchandising, but applied to any two or more stores under the same management selling every description of commodity, in whatever form their enterprises were conducted.

Florida's graduated gross receipts taxes of 1933 against chain stores (stricken down by the Florida

Supreme Court on the authority of the Stewart case in *State* v. *Simpson*, 122 Fla. 582, 166 So. 227, and companion cases), like the Kentucky and Iowa statutes were made applicable to chain stores of every kind and nature selling goods, wares and merchandise of every kind and nature.

The graduated gross receipts taxes involved in the Stewart and Valentine cases, as well as the Florida case of *State* v. *Simpson*, were virtually dissimilar to the taxes imposed by Section 550.16, Florida Statutes, as amended. The businesses being taxed in the Stewart, Valentine and Simpson cases, and that being taxed by said Section 550.16, have little, if anything, in common.

Minnesota v. *National Tea Company*, 309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920, involved a Minnesota Statute levying a graduated gross receipts tax upon all those engaged in conducting chain stores, said graduated tax ranging from one-twentieth of one per cent to one per cent of the gross sales depending upon the total amount of such sales. The greater the volume of business done by a chain store the greater was the per cent of taxes paid. The main difference between the Minnesota tax involved in this case and the Kentucky tax involved in the Stewart case, was that the Kentucky tax applied to the sales of all stores, single stores as well as chain stores, while the Minnesota tax involved in this case applied to the sales of chain stores (two or more under the same management). The Minnesota Supreme Court held the said tax invalid, after an extended discussion relative to the Stewart and Valentine and similar cases (*National Tea Company* v. *State*, 205 Minn. 443, 286 N. W. 360) and this court granted an application for certiorari to review the decision of the Minnesota court (*Minnesota* v. *National Tea Company*, 308

U. S. 547, 60 S. Ct. 294, 84 L. Ed. 460) but upon hearing found uncertainty in the opinion of the Minnesota court as to whether its decision was based upon the federal or a state question, whereupon the case was remanded to the state court for the clarification of this question (309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920) and the Minnesota court entered its order showing that the case was controlled by a state constitutional provision sufficient to justify the court's opinion without regard to the federal question (*National Tea Company* v. *State*, 208 Minn. 607, 294 N. W. 230). This court granted certiorari in this case "because of the importance of the constitutional issues involved in" the Stewart and Valentine cases.

Pacific American Fisheries v. *Territory of Alaska*, 269 U. S. 269, 46 S. Ct. 110, 70 L. Ed. 270, upheld a graduated tax imposed on fish canners where the amount of the tax increased with the size of the pack. In this case there was involved a uniform tax of ten cents per case together with an additional graduated tax on the pack of certain designated fish by the same canner, to wit: "On all cases in excess of ten thousand and not more than twenty-five thousand, five cents per case; in excess of twenty-five thousand and not more than forty thousand, ten cents per case, in excess of forty thousand and not more than fifty thousand, fifteen cents per case, and on all in excess of fifty thousand, twenty cents per case. Here the impact of the cannery tax was similar to the impact of the Florida additional graduated dog race track tax.

Pari-mutuel pools, track's commission and taxes.— Under the statutes of Florida (Chapter 550, Florida Statutes) a licensed dog racking track sells pari-mutuel pool tickets and acts as custodian of the proceeds from such sales, from this pool the track takes a sum up to but not

exceeding seventeen per cent of the total pool leaving the balance of eighty-three per cent of the pool (which is held by the track for the purpose of paying, win, place and show) to be divided among the holders of the winning tickets. The track takes the said seventeen per cent of the pool and retains the balance thereof after the payment of the taxes levied by the statutes. Here the race track has a fund equal to seventeen per cent of the bets paid into the pari-mutuel pool from which is derived funds for the payment of the taxes levied by statute and its profits from the pari-mutuel pool operations. Unlike the businesses involved in the Stewart and Valentine cases, as well as similar cases, where the profits vary in relation to the type of business operated and extent of the sales and may even be non-existent, there is always a fund equal to seventeen per cent of the pari-mutuel pool from which the taxes may be paid. Where the said Stewart, Valentine and like cases involved statutes taxing gross receipts from divers and numerous types and kinds of businesses; here only the operators of dog racing tracks are subject to the tax in question. While the taxes brought in question in the Stewart and Valentine cases were not confined to a particular method of merchandising, and related to businesses whose profits generally varied with the character of the goods sold, here only one type of business is taxed (the business of dog race track operation) and the gross profit may be constant at seventeen per cent of the pari-mutuel business done. Although the graduated rates of taxation involved in the Stewart and Valentine cases bore no relation to profits (either gross or net) the tax here in question never equals the sum received by the race track as its commissions. There is a relationship between total mutuel play and the commissions of the race track, from which the taxes imposed are paid (R. 274). The tax can never exceed the commissions of the race

track, that is the gross profits; in the Stewart and Valentine cases, as well as like and similar cases in lower federal and state courts, there was always the possibility that the tax might even exceed the gross profits from the business taxed.

Reconsideration of Stewart Case.

If the principles laid down by this Court in the Stewart case and upon which that decision rests should be held to apply to and control the present case, then the petitioners submit that this Court should reconsider the Constitutional question there decided.

We, therefore, submit that this case is clearly distinguishable from the Stewart and Valentine cases, and other like cases, and is not, and the Supreme Court of Florida should not have held it to be, governed and controlled by the rule in said cases.

There can be little question that the Supreme Court of Florida decided this case not on the Florida Constitution, but solely and entirely on the Federal Constitution as construed by this Court in the Stewart and Valentine cases. If, as we contend the rationale of the decisions of this Court in those cases is not controlling in this case, then the Florida Court's decision has denied the effectiveness that should be given the statute.

Such a denial should not be allowed without this Court's approbation upon full consideration of this important question.

WHEREFORE, petitioners, Florida State Racing Commission and the Attorney General of Florida, pray this

Court's writ of certiorari to the Florida Supreme Court to review that Court's decision and judgment in this case.

Respectfully submitted,

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Assistant Attorney General,
Of Counsel.

APPENDIX.

And thereafter, to-wit: On the 1st day of June, 1954, the Supreme Court of Florida, after having heard argument of counsel for the respective parties upon the said Transcript of Record and Briefs did render and file its opinion thereon, which Opinion is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1954
EN BANC.

CASE No. 24,980

VOLUSIA COUNTY KENNEL CLUB, INC., a Corporation, and BISCAYNE KENNEL CLUB, INC., a Corporation, Appellants,

vs.

CURTIS A. HAGGARD ET AL., As and Constituting the FLORIDA STATE RACING COMMISSION, Appellees.

Opinion filed June 1, 1954.

An Appeal from the Circuit Court for Leon County, Hugh M. Taylor, Judge.

Loftin, Anderson, Scott, McCarthy & Preston, Robert H. Anderson and D. P. S. Paul, for Appellants.

Richard W. Ervin, Attorney General, Fred M. Burns and George E. Owen, Assistant Attorneys General, John D. Moriarty, Special Assistant Attorney General and Walter E. Dence, for Appellees.

MATHEWS, J.,

This case involves the legality of an additional tax upon the operator's permissible "take" from legalized gambling at dog racing tracks based upon a new or additional classification.

Chapter 28058, Laws of 1953, appears to provide an additional classification within a classification of another classification for the sole purpose of imposing an additional tax, based upon the amount of daily gross receipts for each of the new classifications.

Prior to 1931 all gambling was illegal. In 1931 the Legislature classified gambling into two classes; first, gambling at enclosed race tracks was purified and washed clean of its sin by legislative enactment, and second, gambling on races outside of an enclosure, and all other gambling still remained sinful and clothed with a noxious odor. Then the Legislature further classified race track gambling into two classes, dog tracks and horse tracks, and based upon this classification, different taxes were imposed. In 1953 the Legislature made a further classification of dog tracks for taxation or revenue purposes, and it is upon this classification an additional graduated tax is now imposed.

The new classification for dog tracks is based upon the amount of the daily gross receipts or daily pool and a different rate of taxation is imposed upon each pool according to size or amount.

The appellants contend that they are now engaged in lawful businesses and are entitled to the protection of the Constitution to the same extent as any other lawful business and that the additional tax based upon the new classification between dog tracks denies to them the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution and the Declaration of Rights of the Constitution of the State of Florida.

Sixty percent of the new tax is to be divided equally between the sixty-seven counties and forty percent is to be used for Old Age Assistance. It is urged that the tax should be upheld because it serves a useful purpose. In oral argument, particular emphasis was placed upon the

fact that forty percent of the tax would be used where it was so badly needed for Old Age Assistance. No one questions the fact that the proceeds of the tax would be used for a needful purpose and that assistance to the aged has a particular appeal. Money could hardly be put to a more useful purpose than Old Age Assistance.

Only a few months ago we were urged to ignore sound principles of taxation and plain language of the Legislature in order that race tracks might run additional days because the money would be used for a useful purpose in providing college football scholarships.

Recently it was proposed to the Legislature that certain types of gambling should be legalized if the gambling was conducted by some church and such church received a part of the proceeds of the gambling. Public officials are constantly asked to look the other way at gambling at fairs and expositions. Recently there was a proposal that gambling at jai alai frontons be ignored on Sundays because a part of the proceeds would go to a cancer society. Such proposals are made from time to time because it is said a part of the proceeds of the operation will be used for a good purpose. *Even a good purpose must be accomplished in a lawful manner and it would be a dangerous doctrine to say that the government may or should ignore fundamental principles of the Constitution and the laws in order to accomplish a good purpose.*

It is also urged that the tax should be sustained because it is a tax in the exercise of the police power to further regulate a business with a noxious odor, although legal.

This Court has held that race track gambling establishments are now legal and that those in a like situation should be treated fairly and impartially. *State* v. *Rose*, 122 Fla. 227, 165 So. 60; *Hialeah Race Course* v. *Gulfstream Park Racing Association*, Fla., 37 So. 2d 692; and *Simmons* v. *Hanton*, Fla., 65 So. 2d 42. All doubt with reference to the legality of these enterprises was removed by the adoption of Section 16, Article IX of the State Constitution, whereby the fundamental law recognized the operation of pari-mutuel pools as being legal. As further

evidence of the legislative intent to eliminate the odor theretofore surrounding the operation of race track gambling and to recognize the importance of such businesses it declared that the same "is a substantial business compatible to the *best interests* of the state and the taxes derived therefrom constitute an integral part of the tax structures of the state and counties. * * * and development of this business and influences and affects the financial stability of the state and counties." Section 550.081, F. S.

At the time of the new and additional classification upon which the new and additional tax is based, there was no suggestion nor thought of additional regulation of the dog race track business. In his message to the Legislature the Governor (Journal of the House of Representatives, April 7, 1953, page 11) discussed dog tracks and said:

> "* * * These businesses are not now paying a fair share of the cost of government.
>
> * * *
>
> "I recommend that a Bill be passed for a graduated tax scale that will increase the state's 'take' * * *."

The law making the new classification for the purpose of the additional tax does not contain any word or suggestion with reference to further regulation of the business of race track gambling, either in the title or body of the Act.

There may have been a time when all money from gambling was considered "tainted" money, but now the only complaint about money from legalized race tracks appears to be "taint enough of it."

In deciding this case we must, therefore, eliminate from consideration any theory that the tax is imposed under the police power for the purpose of regulation and conclude that it is a tax question and its legality must be measured by the fundamental principles with reference to taxation for revenue and that the principles of law with reference to police power and regulation are not involved.

If it is an income tax, it violates Section 11, Article IX of the State Constitution. It is not an income tax. The lower Court held: "The tax here under consideration is a tax upon a privilege." It further held that the amount of the tax was based upon the amount of the gross income based upon the different classifications, that the tax was levied upon each " 'daily pool' and the tax as regards each single daily pool is assessed as a tax upon a single taxable transaction." The Chancellor further found an indication that there is a reasonable basis for the Legislature to determine that there is a definite relationship between the size of the daily pools operated by the various tracks and the profits made by such tracks and then held: "The making of such Legislative determination, when justified by the facts, will be presumed for the purpose of sustaining the constitutionality of a Legislative enactment." We find no legislative determination of anything except the desire to get more money from the race tracks. There is no legislative determination that there is any difference in the various classifications except the size of the gross daily income.

A mere examination of the formula set forth in Chapter 28058, Laws of Florida 1953, as a basis of the tax shows that it is nothing more than an additional graduated tax against race tracks in the higher brackets and they are compelled to pay larger sums than the smaller tracks simply because of larger gross receipts. The transactions in the smaller and larger tracks are *identical.*

The appellants contend that the case of *Stewart Dry Goods Company* v. *Lewis,* (1935) 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, and other similar cases are controlling in this case. The Stewart Case appears to be the leading case on the subject. In that case Mr. Justice Roberts (U. S. Supreme Court) said: "We think the graduated rates imposed were not intended to bear any relation to net profits."

In the present case, the Chancellor, in his final decree stated:

> "The contention that the equal protection clause is violated is based largely upon the decision of the

Supreme Court of the United State in the case of *Stewart Dry Goods Company* v. *Lewis*, 55 S. Ct. 525, 294 U. S. 550, 79 L. Ed. 1054. That case involved a tax upon the gross sales of all retail stores based upon a fixed percentage of the amount of sales in each of several brackets specified in the law, the tax being a larger percentage of the gross sales in each higher bracket as the volume of sales increased. Emphasis is laid upon the summary of the holding of the court found in the dissenting opinion of Mr. Justice Cardozo, who said:

> " 'The prevailing opinion commits the court to a holding that a tax upon gross sales, if laid upon a graduated basis, is always and inevitably a denial of the equal protection of the laws, no matter how slight the gradient or moderate the tax.' "

The Stewart case was followed by the case of *Valentine* v. *Great Atlantic & Pacific Tea Co.*, (1936) 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22. That case involved tax on certain types of retail stores based upon an accumulated graduated scale. The Valentine Case was first heard by a three-judge District Court (*Great Atlantic & Pacific Tea Co.* v. *Valentine*, 12 F. Supp. 760), in which it was said:

> "In these particulars the cases are different, but we are unable to say that such differences permit the escape of a similar condemnation as being arbitrary and discriminatory under the pronouncements in the Stewart Case. The additional and higher brackets with corresponding increase in the gross sales tax in the Iowa statute make the discrimination more apparent. The limitation in the classification to the taxation of chain stores only could not change the nature of the tax, and this would be true, giving consideration to the distinctive business species of the chain stores and all economic and welfare questions which are brought about by their advantages in making sales. Such questions might well bear on the propriety of the classification, but not on what constitutes the form or nature of a tax.
>
> * * * * * * *

"In section 4(b) of the Iowa statute we find the tax determined on a basis of the amount of gross sales of merchandise on an accumulative graduated scale and at a fixed rate on each such classification. It thereby becomes indirectly a tax upon each sale and results in an exaction of taxes in the larger graduated class in a greater amount and proportion than those exacted from a business doing the same thing where the amount of the gross sales is smaller. For instance, a merchant in the first class under section 4(b) doing a business of $50,000 a year would pay a tax of 1/20 of 1 per cent. on each dollar of goods sold; the eighth class chain store doing a business of $500,000 would pay a tax of 14/20 of 1 per cent. on each dollar; the chain store in the last class doing a business of more than $9,000,000 would pay a tax of approximately 120/20 of 1 per cent., or 6 per cent., on each dollar of goods sold, and 120 times the rate provided for the gross sales in the smallest classification."

The essence of the Stewart Dry Goods decision is that the amount of the tax must bear a reasonable relation to the value of the thing taxed. If the tax is deemed a license tax, it must bear a reasonable relation to the value of the privilege obtained in return. If it is a gross receipts tax, it must bear a reasonable relation to the value of the gross receipts.

Typical computations of the taxes operation are as follows:

Amount of daily pool	Tax rate	Total commission	Tax	Net comm.
$ 50,000	5%	$ 8,500.00	$ 2,500.00	$ 6,000.00
75,000.	same	12,750.00	4,500.00	8,250.00
75,001.	$4500 & 9%	12,750.17	4,500.09	8,250.08
100,000.	same	17,000.00	6,750.00	10,250.00
100,001.	$6750 & 10%	17,000.17	6,750.10	10,250.07
125,000.	same	21,250.00	9,250.00	12,000.00
125,001.	$9250 & 11%	21,250.17	9,250.11	12,000.06

150,000.	same	25,500.00	12,000.00	13,500.00
150,001.	$12,000 & 12%	25,500.17	12,000.12	13,500.05
200,000.	same	34,000.00	18,000.00	16,000.00

The question here to determine is whether the collection of $8,500 gross recipts out of a $50,000 pool may be taxed $2,500; whether the collection of $17,000 gross receipts out of a $100,000 pool may be taxed $6,750; whether the collection of $34,000 gross receipts out of a $200,000 pool may be taxed $18,000; and whether each status bears a reasonable relation to the others.

This Court applied the holdings of the United States Supreme Court in the Stewart and Valentine Cases in the cases of *State ex rel. Lane Drug Stores* v. *Simpson*, 122 Fla. 582, 166 So. 227; *State ex rel. Adams* v. *Lee*, 122 Fla. 639, 166 So. 249; *Chavers* v. *Harrell*, 122 Fla. 669, 166 So. 261. In the case of *State ex rel. Lane Drug Stores* v. *Simpson, supra*, two taxes were sought to be imposed. The first was a graduated license tax based on the number of stores in the chain, and the second was based on gross receipts graduated according to the number of stores in the chain. In an opinion by Associate Justice Frank A. Smith, this Court upheld a graduated license tax based on the number of stores in the chain as having a reasonable basis in the advantages of multi-store operation. The second tax based on gross receipts graduated according to the number of stores in the chain was held invalid as denying equal protection of the laws. In the opinion it was held:

> "Under subdivision A the store or chain of stores pays for the privilege of enlarging or continuing in business and there is no unjust discrimination as between the different classes. Under class 1 of subdivision B, all stores are treated alike, so that none can complain, for each store or each store in a chain of stores must pay identically the same rate of tax. However, under the different classes of subdivision B we find that the chain store would not merely be paying for a privilege of greater opportunity which it has already obtained by complying with the law and paying the flat tax applicable to its classification, but it is be-

ing charged also according to, if not for, what it has collected during the preceding month without any logical relationship between the amount of its collections (receipts) and a commensurately enhanced opportunity to be enjoyed in the new month. We see no logical reason for saying that A should pay a higher tax because he has sold and collected for an article of merchandise a certain price than B should pay for selling and collecting for the same article at the same price, simply because B had a greater number of stores and had collected more money during the previous month."

In the case of *State ex rel. Adams* v. *Lee, supra,* the same result was reached in an opinion of this Court, written by Mr. Justice Davis, when he said:

"* * * The 'realization' privilege, when contrived to be burdened with a license tax measured solely by the gross sales or gross receipts realized in the course of exercise of the taxable privilege, so proposed to be charged for as a means of raising revenue, is in its nature variable solely and only according to the amount of the realization, and not by the nature or quality of the instrumentality of realization. * * * To put it another way, the privilege of enjoyment (or realization) is the same as to each dollar realized, whether the realization be from a single place of business or from a group of business places considered in the aggregate. A privilege tax measured by the amount of gross receipts realized in the conduct of a business during a specified period of computation, if classified as is done in subdivision B for the imposition of a varying rate of taxation solely predicated upon the character of business by which the same given amount of gross receipts might be realized, would inherently so operate as to exact from two persons, enjoying exactly the same privilege, different amounts for doing exactly similar acts merely because the one has adopted one method of exercising the privilege while the other has chosen a different method."

In a Special Concurring Opinion in the Simpson case, Mr. Justice Brown said:

> "All members of the court are agreed that a gross receipts tax cannot, under the Constitution, be graduated in the manner attempted by subdivision B of section 4 of the act here under review. * * *"

It, therefore, appears that the doctrine established by the Supreme Court of the United States in the Stewart and Valentine Cases has been strictly followed in Florida and is the controlling law in Florida on the subject now under consideration.

In the case of *State ex rel. Cole* v. *Keller,* 129 Fla. 276, 176 So. 176, in an opinion by Mr. Justice Terrell, a tax levied by the City of Tampa upon the graduated gross income of attorneys at law was held to be invalid. See also *City of DeLand* v. *Florida Public Service Company,* 119 Fla. 804, 161 So. 735.

One main difference in the Stewart Case and the case now before the Court is that in the Stewart Case the graduated gross receipts tax was on an annual basis while in this case the graduated gross receipts tax is on a daily basis. The fact of discrimination is the same but is probably greater when the tax is figured on a daily basis rather than an annual basis.

It should be borne in mind that the total amount which the track may take from the daily pool is 17¢ on the dollar of the gross. From that 17¢ the State, prior to 1953, exacted 5¢, leaving the track 12¢ on the dollar to pay all losses, expenses and for profits. The additional tax imposed in 1953 was upon several different classifications based upon the the size of the daily gross receipts for the new classifications. The size of the gross daily take is based upon many features such as the number of people who attend and the amounts they bet, weather conditions, the attractiveness of the track, the advertising which may be done at the expense of the track, the class of dogs racing at the track which is largely determined by the purses offered at the expense of the track. It is naturally concluded that the amount of money the track spends in sales promotion will have a direct

bearing and influence upon the amount of the gross receipts making up the daily pool. The daily pool is made up from all of the bets of all of the people who attend the track that day and its makes no difference whether each bet is taxed or the sum total of the bets is taxed, the result is the same. The sole basis for the increased tax on the different pools of the different tracks in the different classifications is the size of the pool.

In his final decree the Chancellor stated:

> "* * * the tax is imposed upon the track operator for the privilege, not of selling individual chances, but of conducting the pool, regarding the operation of the pool as a single taxable transaction, * * *."

The Chancellor overlooked the fact that the flat tax paid by the operator gave him the privilege of selling individual chances and of *conducting a pool.* The tax involved is an additional tax upon additional classifications based upon the amount of the daily pool and with a different rate of taxation for each such classification. There could be no daily pool without the sale of individual chances. The number of individual chances and the amounts bet determines the gross daily receipts and the daily pool.

The additional tax imposed based upon the new classifications determined solely by the size of the daily gross receipts is a gross receipts tax. The classifications are for tax or revenue purposes and such classifications are not based upon any substantial difference between the various classes established but appear to be purely arbitrary and capricious. The effect of the attempted imposition of the tax is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida.

Reversed.

ROBERTS, C.J., SEBRING, J., AND LEWIS, ASSOCIATE JUSTICE, CONCUR.

TERRELL, THOMAS AND DREW, JJ., DISSENT.

IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A. D. 1954
EN BANC.

VOLUSIA COUNTY KENNEL CLUB, INC. a corporation and BISCAYNE KENNEL CLUB, INC., a corporation, Appellants,

-vs-

CURTIS A. HAGGARD, Chairman and JOE K. HAYS, ROBERT KLOEPPEL, JR., J. D. JOHNSON and J. WESLEY FLY, as and constituting the FLORIDA STATE RACING COMMISSION, Appellees.

TERRELL, J., DISSENTING:

Pursuant to much generalizing the majority opinion comes up with the conclusion that:

> "The additional tax imposed based upon the new classifications determined solely by the size of the daily gross receipts is a gross receipts tax. The classifications are for tax or revenue purposes and such classifications are not based upon any substantial difference between the various classes established but appear to be purely arbitrary and capricious. The effect of the attempted imposition of the tax is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida."

Stewart Dry Goods Co. v. *Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, and *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22, are relied on to support this conclusion.

If we were dealing with a license tax on retail stores measured by gross sales graduated by dollar volume, there would be merit to this pronouncement, but here we are not confronted with a tax on retail stores, we are confronted

with an act which continues the present tax on daily pari-mutuel pools and imposes an additional graduated tax on the permit holders of dog racing tracks measured by the following formula:

Total Pari-Mutuel Pool Dog Track	Pari-Mutuel Pool Tax
Exceed $50,000.00 but do not exceed $75,000.00	$2,500.00 plus 8% of excess over $50,000.00
Exceed $75,000.00 but do not exceed $100,000.00	$4,500.00 plus 9% of excess over $75,000.00
Exceed $100,000.00 but do not exceed $125,000.00	$6,750.00 plus 10% of excess over $100,000.00
Exceed $125,000.00 but do not exceed $150,000.00	$9,250.00 plus 11% of excess over $125,000.00
Exceed $150,000.00	$12,000.00 plus 12% of excess over $150,000.00

In the Stewart Dry Goods case the Court was confronted with a Kentucky statute which imposed a tax on gross sales (each higher bracket bearing a larger percentage of gross sales) of retail stores predicated on a fixed percentage of sales under the following formula:

Annual Gross Sales	Amount of Tax
$400,000 or less	1/20 of 1%
$400,000-$500,000	2/20 of 1%
$500,000-$600,000	5/20 of 1%
$600,000-$700,000	8/20 of 1%
$700,000-$800,000	11/20 of 1%
$800,000-$900,000	14/20 of 1%
$900,000-$1,000,000	17/20 of 1%
In excess of $1,000,000	1%

Examination of the quoted formulas for imposing the gross receipts tax on retail stores and the daily pari-mutuel pool derived from dog racing tracks reveals a wide variance between the incidence and theory on which the two taxes are imposed. The purpose of the two taxes was common in that they stimulated the exchequer but otherwise they had little if any thing in common.

The gross sales tax on retail stores was stricken down because the classification of gross sales graduated by dollar volume was arbitrary and unreasonable and violated the equal protection clause of the Federal Constitution. The purpose of the tax was to equalize the tax burden as it applied to large and small merchants. Whether the merchant was large or small he was engaged in an essential business, one necessary to the economy, convenience and welfare of the people. In the Valentine case the Iowa tax was a flat amount on a cumulative graduated scale and was limited to gross sales of chain stores. The discrimination inheres in the fact that the tax was limited to chain stores and other large businesses to the exclusion of small proprietors engaged in the same kind of business.

No such philosophy prompted the tax assaulted in this case. In the first place a dog track is a luxury or pleasure business, it is not essential to the economy and welfare of the public. While it has the same legal status as the retail business and the taxes derived from it "constitute an integral part of the tax structure of the state and counties," it is nevertheless a gaming enterprise over which the state may exercise a greater and more arbitrary control, in the public interest, through both the police and the taxing power. *Hialeah Race Course* v. *Gulf-Stream Park Racing Ass'n, Inc.*, (Fla.) 37 So. 2d 692. The rule of fairness and equality contemplated in *State* v. *Rose*, 122 Fla. 227, 165 So. 60, applies to operators of dog tracks but it functions on a different level and is controlled by different precepts. Examination of the formula quoted herein discloses the difference in rule and gradient on which the taxing scheme works. It will be readily seen from the act and the formula that the tax in this case was designed (1) to stimulate the exchequer, (2) to place dog tracks on parity with horse tracks based on investment and other factors, (3) impose a check on size, affluence and influence by the exercise of State power. In other words the daily pari-mutuel tax works on the same principle as the personal income tax, as the gradient rises the tax increases and the State's take increases in volume.

Since the tax has to do with a seasonable gaming device which the legislature may suppress or permit within

its discretion, certainly it can prescribe the formula on which the tax is imposed, the only requirement being that all tracks in the same class be treated alike. One purpose of the tax was to curb "bigness" of the type which the Sherman Anti-trust Act condemned as vicious. To admit that the legislature may permit gambling on dog tracks and in the same breath contend that it cannot impose a tax sufficient to control or keep them within bounds is contrary to all reason and experience. It is contrary to every principle on which democratic government is administered.

There is nothing in the Valentine case, the Stewart Dry Goods case or any case decided by this Court that condemns a tax imposed in this manner. It is well known that the group taxed does business in substantially the same manner under like restrictions at the pleasure of the State, that the group taxed is 14 dog racing tracks and the chancellor found that the ratio of net profits to the gross daily pari-mutuel pool before Federal taxes were removed was substantially equal. Appellants in effect contend that substantially equal as applied to group classification has reference to an "iron-clad rule of identical equality according to a precise mathematical formula" but the answer to that contention is that no such plan of taxation has yet been devised. Whether the tax pattern is by straight fee, percentage of the take, or graduated gross of the daily pari-mutuel pool is not material, some hardships and irregularities will arise but they may not amount to invalidity. The mere fact of being unjust or oppressive as to some, may not be ground for judicial interference. *Metropolis Theatre Company* v. *Chicago,* 228 U. S. 61, 335 S. Ct. 441, 57 L. Ed. 730.

In *Pacific American Fisheries* v. *Alaska,* 269 U. S. 269, 46 S. Ct. 110, 70 L. Ed. 270, the court unanimously upheld a tax on fish canneries by rates graduated according to the size of the pack. The showing on which the decision rested being that account of fixed overhead costs and fluctuations in the size of the yearly catch, larger packs meant greater profits. By the same analogy a larger pari-mutuel pool as to dog tracks would mean a larger profit than it would based on the size of the salmon pack. Such a comparison or relationship of profits to gross receipts is not

precluded under the Stewart Dry Goods case. The relationship of net profits to gross receipts is expressly approved in the Pacific American Fisheries case and the Stewart Dry Goods case.

Another factor which I think controlling, is that there is not the slightest analogy between the cases on which the tax here is grounded and that on which the tax in the Stewart Dry Goods case was grounded. In the latter case the gross sales tax was imposed on retail stores throughout the state while the class taxed in this case is fourteen dog racing tracks located at specific spots over the state. Permits to operate them are granted by the State Racing Commission but one track cannot now be established closer than 100 miles to another and wherever established they must be approved by the electorate of the county. Daily pari-mutuel pools are conducted within the track enclosure, every person entering the enclosure, except employees is required to secure a ticket on which an admission charge is imposed. Daily pari-mutuel pools are conducted on each race from which the track deducts 17% of the money wagered. The law fixes the number of racing days and the length of the racing season which is limited to 120 days. The track under the previous law was required to pay the state 5 of the 17% it deducts from each race's pari-mutuel pool. Requisite physical equipment, contracts with Kennels to enter dogs for the races, sufficient betting audience and other requirements essential to the success of a track, we do not attempt to detail.

Such is the condition that Chapter 28058, Acts of 1953, imposing the tax under attack, was proposed to meet. The majority opinion says there was "no legislative determination of anything except the desire to get more money from the race tracks." The record shows however, that the legislature was confronted with the Governor's message recommending the tax and calling their attention to the fact that the dog tracks were not paying their share of the tax load in return for the privilege they enjoy. The Governor's recommendation was in effect an effort to redeem his campaign pledge to the people, which the legislature effectuated by the act under assault. It would therefore seem that the legislature and the people were on notice

that the tax was in the cards, and what the people know, the court is presumed to know, even though a majority of it admit they failed to find it.

In view of this background it does seem ridiculous to contend that the tax in question was for revenue only, that regulations and the police power were not involved, and that there was no legislative determination except to get "more money from the race tracks." It is a matter of common knowledge that when the racing season is on, policing the track areas requires that the police force be very materially enlarged. It is such an attractive bonanza to some that they look forward to it from year to year. Who ever heard of the police force being enlarged when a new retail store was established in the community? It is a fact and the record shows, that the track with the largest daily pari-mutuel pool shows the largest profit and the track with the smallest daily pari-mutuel pool showed the smallest profit. The size of the annual total of pari-mutuel pools of the other tracks do not depart materially from this pattern. The allocation of racing dates and other factors have caused slight departures, but they are not so material as to remove the case from the rule.

For the foregoing reasons I think there is a perfectly rational basis for the legislative determination that the pari-mutuel daily pool is a single taxable transaction and being so, the Stewart Dry Goods case does not control. In fact, I do not think it was any more influence on this case than the Dartmouth College case. We are dealing with a gaming enterprise that the legislature had plenary power to prescribe the formula on which to tax it. This is true because, as pointed out herein, the essentials and the incidence of the daily pari-mutuel pools are so different from those of a retail store there is no common ground by which a tax on both could be imposed by the same formula. The rules that govern retail stores and those that govern the conduct of daily pari-mutuel pools have about as much in common as the rules that govern a poker club and those that govern a Sunday school. We are not confronted with an income tax. We are concerned solely with a tax on a privilege imposed by a formula devised by the legislature. It was designed to require the dog track owner to pay his

share of the burden for the privilege he enjoys. Measured by class every track owner is treated alike. The tax is no more arbitrary than the income tax, the gasoline tax and other tax impositions.

Brush aside the phony halo that beclouds this case and phrase it so that "he who runs may read," it is simple—we have fourteen dog tracks in Florida that enjoy their franchise by grace of the legislature which could abolish them at will. They were provided for the pleasure of those who have gaming blood in their veins, they operate 120 days during the year as directed by the State Racing Commission. The chancellor found that the formula by which the legislature saw fit to hike their taxes treated all of them substantially equal. The tax was proposed on the theory that the dog tracks were not paying their part of the tax burden, it was an equalization measure, the legislature proceeded on the Governor's recommendation and if ever an objective was accomplished in democratic fashion, this one was.

It could have appropriately been upheld on authority of *Pacific American Fisheries* v. *Alaska, supra,* or better on the theory that the regulation was one of pure legislative discretion like raising ones gas tax, tag tax or income tax. Tested by inductive syllogism—if the legislature can require every automobile owner to pay eight cents taxes on every gallon of gas when he was formerly required to pay two cents, or if one can be required to pay $20.00 for automobile tag, for which he once paid ten dollars and if Congress can hike ones income taxes so that it takes practically one-half what he makes to pay them, if he is in one of the upper brackets, it does not make sense to say that the legislature cannot prescribe a formula for hiking the tax on dog racing tracks. Since when did dog tracks become immunized from additional taxes? No one else is, and I can find nothing in the majority opinion that immunizes them except the fallacy that the Stewart Dry Goods case control. The legislature provided a new and different formula for taxing dog tracks and the majority opinion points out no error in that formula but finds the Act bad on the basis of a different formula.

It is a serious matter to strike down an act of the legislature and it should never be done if there is any logical basis on which it can be upheld. Every presumption must be indulged in favor of its validity. Even when a court is confronted with two theories, one to uphold and one to strike it down, it is its duty to adopt that which will uphold the act. None of these presumptions have to be invoked in this case, being a gaming device the legislature can not only limit it to a short season, it can further restrict it by a tax formula in order that it may not become more powerful than its creator.

I therefore dissent and am authorized to say that Mr. Justice Thomas and Mr. Justice Drew concur in this dissent.

THOMAS AND DREW, JJ., CONCUR.

And thereafter, to-wit: On the 1st day of June 1954, the Supreme Court of Florida did enter its order or judgment upon the said Opinion which order or judgment is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF FLORIDA
JUNE TERM A. D. 1954

TUESDAY, JUNE 1, A. D. 1954

VOLUSIA COUNTY KENNELL CLUB, INC., a Corporation and BISCAYNE KENNEL CLUB, INC., a Corporation, *Appellants*,

vs.

CURTIS A. HAGGARD et al., as and constituting the FLORIDA STATE RACING COMMISSION, *Appellees.*

This cause having heretofore been submitted to the Court upon the transcript of the record of the decree herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is error in the said decree; it is, therefore, considered, ordered and decreed by the Court that the said decree of the Circuit Court be and the same is hereby reversed; it is further ordered by the Court that the Appellants do have and recover of and from the Appellees their costs by them in this behalf expended, which costs are taxed in the sum of $_____, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice MATHEWS was this day ordered to be filed.

A true copy,

TEST:

GUYTE P. McCORD
Clerk Supreme Court
(Seal)

And thereafter, to-wit: On the 6th day of July, 1954, the Supreme Court of Florida filed its Opinion denying Petition for Rehearing, which Opinion is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A. D. 1954
EN BANC.

CASE No. 24,980

VOLUSIA COUNTY KENNEL CLUB, INC., a Corporation, and BISCAYNE KENNEL CLUB, INC., a Corporation,
Appellants,

vs.

CURTIS A. HAGGARD, Chairman, and JOE K. HAYS, ROBERT KLOEPPEL, JR., J. D. JOHNSON and J. WESLEY FLY, as and constituting the FLORIDA RACING COMMISSION,
Appellees.

Opinion filed July 6, 1954

An Appeal from the Circuit Court for Leon County, Hugh M. Taylor, Judge

Loftin, Anderson, Scott, McCarthy & Preston, Robert H. Anderson and D. P. S. Paul, for Appellants

Richard W. Ervin, Attorney General, Fred M. Burns, George E. Owen, Assistant Attorneys General, John D. Moriarty, Special Assistant Attorney General and Walter E. Dence, for Appellees.

On Petition for Rehearing Denied.

MATHEWS, J.

A "Petition for Rehearing" has been filed in this case. It contains 13 pages consisting of 10 grounds divided into

subdivisions. Each ground is preceded by an allegation that the Court "overlooked and failed to consider" some particular question or theory which is then pointed out. A comparison of the petition with the opinion emphasizes the fact that the specific questions or theories which it is alleged the Court overlooked and failed to consider were not overlooked; that the Court did consider, discuss and pass upon each of the questions or theories presented. The petition simply takes issue with the Court on the rulings and conclusions of the Court and amounts to a re-argument of the case without the permission of the Court.

This Court has repeatedly pointed out that violations of Supreme Court Rule 25(b), with reference to petitions for rehearing, may cause such applications to be dismissed. We have said that among such violations are: (1) to include in the petition a written argument and citation of authorities; (2) to join issue with the Court as to the correctness of its conclusions upon points involved in its decision that were expressly considered and passed upon; and (3) to re-argue the cause in the application in advance of a permit from the Court for such rehearing. *Hull* v. *Burr*, 58 Fla. 432, 50 So. 754; *Texas Co.* v. *Davidson*, 76 Fla. 475, 478, 80 So. 558; *Payne* v. *Ivey*, 83 Fla. 436, 93 So. 143; *Atlantic Coast Line R. Co.* v. *City of Lakeland*, 94 Fla. 347, 115 So. 669. Notwithstanding the violation of the rules that is apparent upon the face of the petition before us, we will, in the exercise of our discretion, consider the petition and discuss the grounds raised.

We have noted the statement in the petition for rehearing that our opinion "strangely indicates that the Legislature is powerless to change the tax rate on dog tracks because of the flat tax." There is nothing in the opinion to justify such a statement or conclusion. There are many able men in each branch of the Legislature with sufficient ability and understanding to draft a law to increase the tax on dog tracks without doing violence to the Constitutions of the United States and the State of Florida.

In ground 1 of the petition for rehearing it is stated that the Court "overlooked or failed to consider" that the tax imposed is an excise tax or license tax for the exercise

of the privilege of doing business and that the tax bears a direct relationship to the value of the privilege for which the license tax is enacted. The petition throughout argues that the Court overlooked the fact that there was a legislative finding or determination of a relationship between the size of the pools conducted by the various tracks and the profits made by such tracks.

We did not overlook these questions but discussed, considered and passed upon them. We assumed that everyone was familiar with the provisions of Section 11, Article IX of the State Constitution, which prohibits taxes upon income in this state and considered it unnecessary to discuss the questions at length. This amendment to the Constitution was originally adopted at the General Election of 1924 when it was approved by an overwhelming majority of the electors.

It is noteworthy that the attempt of the Federal Government to levy an income tax was declared illegal and unconstitutional the Supreme Court of the United States, and it required a special amendment to the Constitution of the United States granting such power to the Congress before such a tax could be imposed and upheld. Thereafter, the people of Florida overwhelmingly approved a special amendent to the Florida Constitution prohibiting the imposition of such a tax in this state.

It was clearly held in the opinion to which the petition for rehearing is addressed that the tax in question was not an income tax, and that if the Legislature intended it as an income tax, the statute would be a direct violation of Section 11, Article IX of the State Constitution. If there had been a legislative determination of the relationship between the size of the pools conducted by the operators at the various tracks and the profits made by such tracks, then the proposed tax would have been an income tax and prohibited by Section 11, Article IX, State Constitution. We then proceeded to quote the statement of the lower Court, that "the tax here under consideration is a tax upon a privilege." It should, therefore, be apparent and obvious that we did not overlook the fact that the tax in question was an attempted imposition of a tax upon a privilege, or that it was

contended that the tax bore a direct relationship to the value of the privilege for which the license tax is enacted. We held, however, that it appeared from the Act itself that there was no legislative determination of any relationship between the size of the pools operated by the various tracks and the profits made by such tracks, and that there was no legislative determination of anything except a desire to get more money from the tracks. The classification, based solely on gross receipts, and the inequalities, were considered and pointed out. It should be clear from the opinion that we did not overlook the questions mentioned in the petition for rehearing but actually discussed and passed upon them, and the law of the case was settled so far as these questions were concerned.

We did not discuss income tax cases for the obvious reason that such a tax in this state is prohibited by a special constitutional amendment, and such cases have no application in this case. Neither did we consider or discuss inheritance tax cases because they are of no importance in applying the principles of taxation controlling this case. To say the least, the inheritance tax is not a tax imposed for the privilege of doing business.

No good purpose could be served by any further discussion of the cases that were discussed in the original opinion; to-wit, *Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054; *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22; *State ex rel. Lane Drug Stores* v. *Simpson*, 122 Fla. 582, 166 So. 227; *State ex rel. Adams* v. *Lee*, 122 Fla. 639, 166 So. 249; *City of DeLand* v. *Florida Public Service Company*, 119 Fla. 804, 161 So. 735; *State ex rel. Cole* v. *Keller*, 129 Fla. 276, 176 So. 176; and *State ex rel. McKay* v. *Keller*, 140 Fla. 346, 191 So. 542. However, it may be well to point out that in the case of *State ex rel. Cole* v. *Keller, supra*, in an opinion by Mr. Justice Terrell, he discussed the prohibition about income tax contained in Section 11 of Article IX of the Constitution, but decided the case on the ground that a municipality did not have the authority to levy the tax in question. In the opinion it was stated:

"* * * It does not contemplate income from other sources which are wholly independent of and separate from that obtained from his law practice. Limited in this manner, it might be possible, though we do not decide that question, to uphold on authority of the Titusville case, but if it can be predicated on sources of income independent of his law practice, then it may be ruled by the Stewart Dry Goods case or it may run counter to Section Eleven of Article Nine of the Constitution of Florida. The facts before us are not sufficient to warrant a decision of these questions. The distinction between the two cases is in some respects metaphysical, but if it was not and the facts were present, the answers could be very properly pretermitted because the case can be disposed of on the question of the city's power to impose the tax.

* * *

"In the enactment of any kind of a tax law the Legislature whether State or Municipal, is torn between two conflicting interests, the predilection of the group on whom the tax is imposed to challenge it and the demand of the benefited group to lay on all the traffic will bear. Common sense, being inarticulate, rarely points the way out of the dilemma. It should be the pole star to guide the legislative body in all matters, but it is too often paralyzed under the spell of vociferous groups that have the distinction of controlling large blocks of votes.

"Having reached the conclusion that the tax complained of was imposed without authority, it becomes unnecessary to discuss other questions urged. The motion to quash the alternative writ is denied."

In a Special Concurring Opinion, the then Chief Justice Ellis said:

"I agree to the conclusion reached upon the ground that no authority exists under the Charter of the City of Tampa to exercise such power of taxation as at-

tempted by the Ordinance attacked, if indeed such power could be conferred by the Legislature.

* * *

"In the ordinance attacked an effort is obviously made to tax the studious labor, industry and talent by which one attorney makes his franchise or license produce more income than another's. Besides, it is an attempted tax on income in violation of Article IX, Section 11, Constitution of Florida. See *McCaskell* v. *State*, 53 Ala. 510, Ann. Cas. 1912A 602, note."

In the later case of *State ex rel. McKay* v. *Keller*, *supra*, in an opinion by the late Justice Chapman, concurred in by the then Chief Justice Terrell, and Justices Whitfield, Brown and Thomas, this Court said:

"It is not difficult to distinguish between an excise tax or tax on the privilege of engaging in an occupation or a sales tax or transaction tax or an indirect sales tax and hold that they are not controlled or fall within the inhibitions of Section 11 of Article IX of the Constitution as shown by the decisions, *supra*. The relator is an attorney and the receipts, either net or gross, cannot be classified as an excise tax, sales tax or tax on the privilege of practicing law within the meaning of Section 11 of Article IX whereby it is unlawful to levy on the income of citizens or residents of Florida on the part of the State of Florida. The learning and legal ability of an attorney are among his business assets and differ materially from capital invested in a mercantile business.

"Ordinance No. 689-A is in contravention of and falls within the inhibitions of Section 11 of Article IX of the Constitution of Florida and is invalid and void as it applies to the relator. Careful consideration has been given to the briefs of counsel for the respective parties and the authorities cited have been examined. The motion to quash the alternative writ of mandamus filed on the part of the respondent is hereby denied.

"It is so ordered."

The petitioners' argument set forth in a paragraph of ground 3 which reads as follows:

> "This Court's statement on page 11 of its opinion, 'The chancellor overlooked the fact that the flat tax paid by the operator gave him the privilege of selling individual chances and of conducting a pool,' strangely indicates that the Legislature is powerless to change the tax rate on dog tracks because of the flat tax, over-looking that in the state gasoline tax field a dealer's flat tax plus a gallonage tax has long been upheld with variations in these taxes from time to time."

is apparently the result of a misconception of the effect of our opinion; however, the example contained therein of the gallonage tax on gasoline constitutes a good illustration of the invalidity of the tax attempted to be imposed in this case. While it is true that the flat *rate* of tax on gasoline has been changed by the Legislature from time to time, the *rate* as changed has always applied to all filling stations alike. The gallonage tax on gasoline has always remained the same for every dealer. While the amount of tax which a dealer has paid has varied, from time to time, because of the variation in the number of gallons sold or business done, the *rate* has always remained the same. There has never been an attempt to classify such stations on the basis of the number of gallons sold and to impose a different rate upon each classification based upon any such formula.

In ground 7 petitioners apparently fail to recognize any difference or distinction between the *regulation of a business* on the one hand, and the *imposition of a tax for the privilege of doing business* on the other. The ground is a re-argument of the theory that the Legislature has the same power in imposing a tax that it has in regulating the dates upon which a track may operate. The State, through its Legislature, has admitted that it is in partnership in the gambling end of the race track business and is interested primarily in the amount of money the State can get from the operation of such tracks. The State, therefore, rewards the horse race track producing the most

revenue by granting to it a certain privilege with reference to selecting dates within which to operate. There is no similarity between the principles involved in selecting dates on which to operate tracks and the imposition of additional tax upon the privilege of operating with the rate of tax based solely upon gross receipts or the amount of business done.

The Legislature, and not the Court, declared the public policy of the State with reference to gambling when the Legislature declared that race track gambling "is a substantial business compatible to the best interests of the state and the taxes derived therefrom constitute an integral part of the tax structures of the state and counties. * * * and development of this business and influences and affects the financial stability of the state and counties." Section 550.081 F. S.

In ground 9 petitioners complain that the Court did not take judicial notice of the power of dog tracks and their lobbyists and how their political influence has increased to such an extent that it has its effect in the selection of persons "for the high office of Governor." Petitioners insist that this may have been one of the reasons why the Legislature attempted to "trim the sails" of those engaged in the dog track business, which has been declared by the Legislature to be a legitimate business, and eliminate the same by the power of taxation. The questions raised in this ground are purely political and have no bearing upon the issues involved in this case. The Legislature has great power and has exercised such power on many occasions to improve our election laws and eliminate as far as practical undue influence in elections. These questions should be left to the Legislature and political power or influence should have no place in our determination of judicial questions.

It may be that if a group becomes so powerful in politics that it can name a Governor, it should be put out of business. It may be that the State should go back to that period of time prior to the 1931 Session of the Legislature when all gambling was upon an equal basis and was considered a crime; but the Legislature of 1931 changed the policy of this State with reference to gambling, and it is

unnecessary in a petition for rehearing or otherwise that the Court be reminded that the wisdom, policy, motive and determination with reference to that policy is a legislative and not a judicial function.

In the course of time other businesses may become so large and powerful that they may seek to exercise an undue influence in electing public officials. A combination of radios or television broadcasts and the publication and circulation of newspapers may in the future become targets for criticism because of their alleged political power. If, by this method of taxation, the "sails" of one legitimate business may be "trimmed" to reduce its power, the sails of any other legitimate business may be trimmed for the same purpose.

Indeed, this very kind of tax was attempted. In the case of *City of Tampa* v. *Tampa Times Co.*, 153 Fla. 709, 15 So. 2d 612, in striking down such a tax, in an opinion by Mr. Justice Adams, concurred in by Chief Justice Buford and Justices Terrell, Brown, Chapman, Thomas and Sebring, this court said:

> "It would serve no useful purpose to cite other authorities inasmuch as we have concluded that the decision in this case is controlled by *Grosjean* v. *American Press Co., supra.* We cannot say that the tax levied here is arbitrary, unreasonable or was actuated by anything other than good motive, however we rest our decision solely upon the proposition that any license tax based on volume of circulation and graduated by scale as is here presented is void as impairing the freedom of the press guaranteed by the First and Fourteenth Amendment to the United States Constitution.
>
> "The decree appealed from is affirmed."

If such a theory were ever countenanced it would be entirely possible, for example, to levy a progressive privilege tax on each daily newspaper published in the State, in accordance with a stated classification such as exists in the tax here involved, with a proviso in the statute that as to a daily circulation of 100,000 copies the tax would be

1¢ per copy *but* that for every copy beyond that figure an additional tax of 1¢ per copy would be levied, progressively, for each 10,000 papers sold.

It should not be difficult to discern that such a tax would depend solely on circulation and would operate to penalize every effort to increase circulation. Inequality becomes so apparent and obvious when the rate of taxation is increased based solely on the amount of business done that further discussion of the question is unnecessary.

The constitutional guarantees were not placed in our Constitutions in order to protect particular groups. These guarantees were placed there to apply alike to all those similarly situated, irrespective of power, influence, or station in life. They were meant to apply to the large and the small, the rich and the poor, the saint and the sinner, the believer and the infidel, irrespective of class, race or creed. The courts have no power to suspend these constitutional guarantees simply because of the fact that it may be the popular or expedient thing to do with reference to a particular group or situation. It would be a poor substitute, indeed, for our constitutional system of government for the courts ever to adopt a policy of upholding a law which violates constitutional guarantees merely because it may be the popular thing to do as to a particular group or on a given occasion. If popularity contests ever become the criteria for determining the validity of law, the uncontrolled will of the mob will become the substitute for constitutional government. It seems superfluous to say that a poll to ascertain public opinion should never be the necessary prerequisite to a judicial opinion under our constitutional system for the administration of Justice.

It is clear that in the original opinion we did not "strangely indicate that the Legislature is powerless to change the tax rate on dog tracks", or "immunize them from further taxation", or that we had any desire to do so. What we held, and now repeat, was that any attempted tax upon a new classification based solely on the amount of the gross receipts of a business heretofore recognized by the Legislature as being a legitimate business constituted a denial of the Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States and

the Declaration of Rights of the State of Florida. Parenthetically, it cannot necessarily be said that the objection to the attempted tax would be applicable if the increase in the rate was made to apply to all dog tracks alike.

The petition for re-hearing should be, and the same is hereby, denied.

ROBERT, CJ., SEBRING, J., AND LEWIS, ASSOCIATE JUSTICE, CONCUR.

TERRELL, THOMAS AND DREW, JJ., DISSENT.

FILED
OCT 2 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 318.

JULIAN LANE, ET AL.,
Petitioners,

v.

VOLUSIA COUNTY KENNEL CLUB, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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ARGUMENT.

The Decision Below Was Based upon an Independent Ground of State Law.

This case involves a unique Florida situation. The state statute which was struck down by the Florida Supreme Court levied a peculiar kind of graduated tax on

betting at Florida dog racing tracks. Because of the very special importance of gambling revenue in Florida and its relation to Florida public finance the type of pari-mutuel betting tax construed in this case has no exact parallel, so far as counsel has been able to determine, in any other state in the union.

The petitioners concede that if the judgment of the Florida Supreme Court is based upon an independent state constitutional ground as well as a federal ground the Petition for Certiorari must be denied under the rule laid down in *Lynch* v. *New York ex rel. Pierson* (1934), 293 U. S. 52. In the Lynch case this Court held that a decision by a state court, holding a state statute invalid because repugnant to provisions in both the federal and state constitutions rests upon an adequate nonfederal ground and will not be reviewed by this Court. This rule was affirmed again in *Minnesota* v. *National Tea Co.* (1940), 309 U. S. 551, 554.[1] See also *Fox Film Corp.* v. *Muller* (1935), 296 U. S. 207; *City of New York* v. *Central Savings Bank* (1939), 306 U. S. 661; *Herb* v. *Pitcairn* (1945), 324 U. S. 117.

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[1]*Morehead* v. *New York ex rel. Tipaldo* (1936), 298 U. S. 587 relied on by petitioners is not inconsistent with this rule. In the statement of the proceedings in the Morehead case this Court was careful to point out that the remittitur of the lower court certified that the federal constitutional question was presented and "necessarily" passed upon. Unlike the Florida court the New York court cited no state decisions in support of its ruling and it seems clear that by the use of the word "necessarily" and from an examination of the opinion of the Court of Appeals of New York and of the remittitur that the state court did not rest its final conclusion and decision upon the repugnancy of the state statute on the state constitution, but passed the state ground and rested its decision solely upon the invalidity of the statute under the Fourteenth Amendment to the Federal Constitution. As a result the jurisdiction of this Court in the Morehead case may be sustained under the rule of *Grayson* v. *Harris* (1925), 267 U. S. 352.

It clearly appears that the decision of the Florida Supreme Court was based upon an independent ground of state law which had been present in this case from the outset and which was urged at every stage of the proceedings.

The complaint alleged that the state statute involved in this case violated Section 1 of the Declaration of Rights of the Florida Constitution[2] (R. 13) and the petitioners specifically denied this allegation (R. 27-8).

The Florida Supreme Court in each of its three opinions squarely held that this special dog track tax violated the Florida Constitution as well as the Federal:

Original Opinion:

> "The effect of the attempted imposition of the tax is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida." (R. 296)

On Petition for Rehearing:

> "What we held, and now repeat, was that any attempted tax upon a new classification based solely on the amount of the gross receipts of a business heretofore recognized by the Legislature as being a legitimate business constituted a denial of the Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the State of Florida." (R. 330-1)

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[2]"All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety." Section 1 of the Florida Declaration of Rights.

On Petition to Recall the Mandate:

"The majority opinions do not immunize the dog tracks from further taxation, but did strike down the 1953 tax because it was a graduated gross receipts tax (as distinguished from a regulatory measure under the state police power) of a type consistently invalidated by this court over a period of many years. We have held that this tax and others of a kindred nature violated the Constitution of this sovereign state. See *State ex rel. Lane Drug Stores* v. *Simpson*, 122 Fla. 582, 166 So. 227; *State ex rel. Adams* v. *Lee*, 122 Fla. 639, 166 So. 249; *City of DeLand* v. *Florida Public Service Company*, 119 Fla. 804, 161 So. 735; *State ex rel. Cole* v. *Keller*, 129 Fla. 276, 176 So. 176; *State ex rel. McKay* v. *Keller*, 140 Fla. 346, 191 So. 542; and *City of Tampa* v. *Tampa Times Co.*, 153 Fla. 709, 15 So. 2d 612. We also held that the tax here involved violated the Constitution of the United States, under the authority of *Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054; *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22." (R. 338)

Of the six Florida cases cited above by the Supreme Court and relied upon as controlling the state constitutional question in the case at bar, in only three was a federal constitutional question passed upon. The court in the other three cases cited held the state statute invalid on state grounds alone. And the three which did pass upon a federal question also held that the statute violated the Florida Constitution. These three cases were decided by the Florida Supreme Court almost twenty years ago and have been settled principles of state constitutional law ever since.

These six Florida cases clearly illustrate the error of the petitioners' contention that the holding of the Florida

Supreme Court was not based on "any separate and independent construction of the State constitution."[3]

Leaving the three Florida cases aside which were based wholly on state grounds can it be logically argued that a court renounces its independence when in construing a statute it reaffirms three of its own decisions which were influenced by the views of a court of another jurisdiction construing a similar statute? Suppose the Florida Supreme Court in the three cases listed above in which federal decisions are discussed had instead cited decisions of the California Supreme Court. Could it be seriously argued that the Florida court had not made an "independent" decision on its constitution merely because the Florida cases it relied on cited California authority? Every common law court is guided in its decisions by precedents from other jurisdictions in deciding questions arising under its state law. As Mr. Chief Justice Hughes pointed out in his dissenting opinion in *Minnesota* v. *National Tea Co., supra*:

> "That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review. Whether in this case we thought that the state tax was repugnant to the Federal Constitution or consistent with it, the judgment of the state court that the tax violated the state constitution would still stand."

To follow petitioners' argument to its logical conclusion the only state court decision that would be based on an "independent state ground" would be one which ignored everything ever decided by any other court.

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[3]Page 7 of the Petition.

For the petitioners to bring their petition within the jurisdiction of this Court they must show the Florida decision rests wholly on federal grounds. Any doubt is resolved against the exercise of jurisdiction.[4]

In the case at bar—not only is there no explicit statement by the Florida Supreme Court that it held the tax invalid solely because of violation of the Federal Constitution but on the contrary an explicit statement that the law was held invalid for violation of the State as well as the Federal Constitutions.

CONCLUSION.

The decision below was correct and clearly based on state as well as federal grounds. We respectfully submit the Petition for Certiorari should be denied.

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[4]*Klinger* v. *Missouri* (1872), 13 Wall. 257, 263; *Eustis* v. *Bolles* (1893), 150 U. S. 361, 367; *Dibble* v. *Bellingham Bay Land Company* (1896), 163 U. S. 63, 69; *Allen* v. *Arguimbau* (1905), 198 U. S. 149; *Memphis Natural Gas Company* v. *Beeler* (1942), 315 U. S. 649.